DATIN PADUKA PHANG OI CHOO v. TAN SRI DATUK G GNANALINGAM & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
ZAMANI A RAHIM JCA
ZALEHA YUSOF JCA
[CIVIL APPEALS NO: B-02(IM)-760-04-2016, B-02(IM)-761-04-2016, B-02(IM)-762-04-2016 & B-02(IM)-763-04-2016]
17 FEBRUARY 2017

CIVIL PROCEDURE: *Striking out – Appeal against – Third party proceedings – Action premised on breach of fiduciary duties of Board member in relation to project – Board member initiated third party proceedings against other Board members – Whether third parties owed duty of care and collectively responsible for all decisions and activities undertaken – High Court struck out third party notice upon applications for striking out by third parties – Whether there were triable issues – Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c) & (d)*

TORT: *Joint tortfeasors – Contribution – Action premised on breach of fiduciary duties of Board member in relation to project – Board member initiated third party proceedings against other Board members – Whether third parties owed duty of care and collectively responsible for all decisions and activities undertaken – Whether third parties joint tortfeasors*

Port Kelang Authority ('PKA') commenced an action against the appellant at the High Court premised on a breach of fiduciary duties in the latter's capacity as a general manager and Board member of PKA pertaining to the Port Kelang Free Zone Project ('PKFZ project'). In turn, the appellant initiated third party proceedings against 26 Board members of PKA ('the third parties') in the High Court to seek contribution in the event she was found liable for any loss and damage suffered by PKA. According to the appellant, the third parties (i) collectively owed a duty of care, both fiduciary and at common law, to PKA; (ii) were collectively responsible for all the decisions and activities undertaken by the Board of PKA; and (iii) were jointly involved and/or participated in the discussions, deliberations and/or decisions made during the Board meetings of PKA and therefore had knowledge of all decisions made and/or to be made by the Board in relation to the PKFZ project. The third parties applied to the High Court to strike out the appellant's third party notice pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 ('the ROC'). In striking out the third party notice, the Judicial Commissioner ('the JC') held that (i) a third party claim could not exist independently and be a separate claim unrelated or without any nexus to PKA's claim against the appellant; (ii) the appellant's claim for contribution could not stand against the third parties as there existed no duty between the parties; and (iii) PKA's claim was in relation to personal breaches committed by the appellant which did not involve the third parties.

Dissatisfied with the decision of the JC, the appellant filed the present appeals on the grounds that the JC erred in law and/or in fact in, *inter alia*, (i) not finding there were triable issues, especially the involvement of the third parties in the collective decision in the meetings of the Board of PKA; (ii) finding that the third parties could not be liable as joint tortfeasors as there was no such provision in the Port Authorities Act 1963 ('the Act'); and (iii) failing to find the third parties as joint tortfeasors were collectively liable for the claim of contribution, in the event that the PKA's claim against the appellant was proven.

Held (allowing appeals; setting aside order of High Court)
Per Zamani A Rahim JCA delivering the judgment of the court:

(1) The issues could only be determined by way of an oral or *viva voce* evidence at trial because, *inter alia*, (i) it was insufficient to consider the third parties' extent of involvement in the decision-making process surrounding the PKFZ project solely on the Board meeting minutes produced before the High Court; (ii) the distinction, if any to be drawn between the roles of the appellant and the third parties, could only be drawn at the close of trial and not summarily by way of affidavit evidence; and (iii) the entitlement on the reliance on statutory protection under s. 3 of the Act could only be triggered once a determination is made on whether the acts taken by the third parties were done for a *bona fide* purpose. The third parties' reliance on this provision at this stage was premature. (para 23)

(2) The JC fell into error in holding that (i) the appellant's third party claim must be related to and/or have a nexus to the PKA's pleaded claim. There was no necessity for the PKA's claim against the appellant to be related/and or connected to the issue of whether the collective involvement of the third parties during the Board meetings of PKA had contributed to the loss and damage suffered by PKA; (ii) the appellant's liability to PKA, if proven, was of a personal nature because, *inter alia*, the third parties played a crucial factor in expressing their views and/or input and were the ultimate approving authorities of PKA; and (iii) the appellant's claim for contribution against the third parties could not stand because no duty was found to exist between the parties. A claim for contribution does not require there to be a relationship/duty to exist. The appellant was only required to show that the third parties were joint tortfeasors and participated in the procurement of a tort causing loss and damage to PKA, if proven. (paras 29, 30, 33, 36 & 39)

(3) The issue of whether or not the third parties had actively participated in the Board meetings of PKA was not one which could be summarily determined in order to make a finding as to whether the third parties were joint tortfeasors. The true extent of the third parties' involvement during the Board meetings of PKA could only be properly determined

through a full trial. In view of the complexities and intricate facts involved, the claim against the third parties were allowed to proceed and be ventilated in a full trial. (paras 45 & 46)

Bahasa Malaysia *Headnotes*

Port Kelang Authority ('PKA') telah memulakan satu tindakan di Mahkamah Tinggi terhadap perayu berasaskan pelanggaran tanggungjawab fidusiari dalam kapasiti perayu sebagai pengurus besar dan ahli Lembaga PKA berkenaan Projek Zon Bebas Pelabuhan Kelang ('projek PKFZ'). Susulan itu, perayu memulakan tindakan pihak ketiga di Mahkamah Tinggi terhadap 26 ahli Lembaga PKA ('semua pihak ketiga'), memohon sumbangan jika dia didapati bersalah bagi apa-apa kerugian atau kerosakan yang dialami oleh PKA. Menurut perayu, semua pihak ketiga (i) mempunyai tanggungjawab berhati-hati secara kolektif, baik dari segi fidusiari mahupun bawah common law, terhadap PKA; (ii) bertanggungjawab secara kolektif bagi semua keputusan yang diambil dan aktiviti yang dijalankan oleh Lembaga PKA; dan (iii) terlibat dan/atau mengambil bahagian bersama dalam perbincangan, pertimbangan dan/atau keputusan yang dibuat semasa mesyuarat Lembaga PKA dan dengan itu, mempunyai pengetahuan tentang semua keputusan yang dibuat dan/atau akan dibuat oleh Lembaga berkenaan projek PKFZ. Semua pihak ketiga memohon agar Mahkamah Tinggi membatalkan notis pihak ketiga perayu bawah A. 18 k. 19(1)(a), (b), (c) dan (d) Kaedah-Kaedah Mahkamah 2012. Dalam membatalkan notis pihak ketiga, Pesuruhjaya Kehakiman ('PK') memutuskan (i) tuntutan pihak ketiga tidak boleh wujud dengan sendirinya dan menjadi satu tuntutan berasingan yang tiada kaitan atau sangkutan dengan tuntutan PKA terhadap perayu; (ii) tuntutan perayu terhadap semua pihak ketiga bagi sumbangan tidak boleh kekal kerana tidak wujud tanggungjawab antara pihak-pihak; dan (iii) tuntutan PKA berkenaan pelanggaran perseorangan oleh perayu tidak melibatkan semua pihak ketiga. Tidak berpuas hati dengan keputusan PK, perayu memfailkan rayuan ini dan menghujahkan PK terkhilaf bawah undang-undang dan/atau fakta apabila beliau, antara lain, (i) tidak memutuskan terdapat isu yang boleh dibicarakan, khususnya penglibatan semua pihak ketiga dalam keputusan kolektif yang dicapai dalam mesyuarat Lembaga PKA; (ii) memutuskan pihak ketiga tidak bertanggungan sebagai pelaku tort bersama kerana tidak wujud peruntukan sedemikian dalam Akta Pihak Berkuasa Pelabuhan ('Akta'); dan (iii) tidak memutuskan semua pihak ketiga, sebagai pelaku tort bersama, bertanggungan bagi tuntutan sumbangan sekiranya tuntutan PKA terhadap perayu berjaya dibuktikan.

Diputuskan (membenarkan rayuan-rayuan; mengetepikan perintah Mahkamah Tinggi)

Oleh Zamani A Rahim HMR menyampaikan penghakiman mahkamah:

(1) Isu-isu yang timbul hanya boleh diputuskan melalui keterangan *viva voce* di mahkamah kerana, antara lain, (i) tidak cukup sekadar mempertimbangkan tahap penglibatan semua pihak ketiga dalam proses

membuat keputusan berkenaan projek PKFZ berdasarkan minit mesyuarat Lembaga yang dikemukakan di Mahkamah Tinggi; (ii) perbezaan hanya boleh dibuat, jika perlu dibuat terhadap peranan perayu dan semua pihak ketiga, pada penutup perbicaraan dan bukan secara ringkas melalui keterangan afidavit; dan (iii) kelayakan bersandar pada perlindungan statutori bawah s. 3 Akta hanya boleh dibangkitkan jika pertimbangan telah dibuat tentang sama ada tindakan-tindakan semua pihak ketiga dijalankan dengan tujuan suci hati. Sandaran semua pihak ketiga pada peruntukan ini adalah pramatang.

(2) Pesuruhjaya Kehakiman terkhilaf apabila beliau memutuskan (i) tuntutan pihak ketiga oleh perayu mesti berkaitan dan/atau bersangkutan dengan tuntutan yang diplidkan. Tiada keperluan bagi tuntutan PKA terhadap perayu berkaitan/dan atau bersangkutan dengan isu sama ada penglibatan semua pihak ketiga secara kolektif dalam mesyuarat Lembaga PKA menyumbang pada kerugian atau kerosakan yang dialami oleh PKA; (ii) liabiliti perayu pada PKA, jika terbukti, bersifat perseorangan kerana, antara lain, memainkan peranan penting dalam menzahirkan pendapat dan/atau input mereka dan pihak berkuasa tertinggi yang memberi kelulusan dalam PKA; dan (iii) tuntutan perayu terhadap semua pihak ketiga bagi sumbangan tidak boleh kekal kerana tiada tanggungjawab yang wujud antara pihak-pihak. Tuntutan sumbangan tidak mengkehendaki kewujudan hubungan/tanggungjawab. Perayu hanya perlu membuktikan semua pihak ketiga adalah pelaku tort bersama dan mengambil bahagian dalam pelakuan tort hingga menyebabkan kerugian dan kerosakan kepada PKA, jika terbukti.

(3) Isu sama ada semua pihak ketiga mengambil bahagian secara aktif dalam mesyuarat Lembaga PKA tidak boleh diputuskan dengan ringkas untuk menentukan sama ada semua pihak ketiga adalah pelaku tort bersama. Tahap penglibatan sebenar semua pihak ketiga semasa mesyuarat Lembaga PKA hanya boleh diputuskan dengan betul melalui perbicaraan penuh. Melihat pada kesukaran dan kerumitan fakta-fakta, tuntutan terhadap pihak ketiga dibenarkan untuk berjalan dan diselesaikan dalam satu perbicaraan penuh.

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

CC Ng & Brothers Sdn Bhd v. Government of the State of Pahang [1985] 1 CLJ 235; [1985] CLJ (Rep) 45 FC ***(refd)***

Dato' Abul Hasan Mohamed Rashid v. Multi-Code Electronics Industries (M) Bhd & Anor [2012] 1 LNS 258 CA ***(refd)***

Dingle v. Associated Newspapers Ltd [1961] 2 QB 162 ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Mat Abu Man v. Medical Superintendent, General Hospital Taiping & Ors [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98 SC ***(refd)***

A *See Thong & Anor v. Saw Beng Chong [2012] 1 LNS 817 CA* ***(refd)***
Sime Darby Bhd & Ors v. Dato' Seri Ahmad Zubir Hj Murshid & Ors (Tun Musa Hitam & Ors, Third parties) [2012] 9 MLJ 464 ***(refd)***
Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors [2012] 1 CLJ 75 CA ***(refd)***
Wenlock v. Moloney [1965] 2 All ER 871 ***(refd)***

B **Legislation referred to:**
Civil Law Act 1956, s. 10(1)(c)
Port Authorities Act 1963, ss. 2, 3, 3A(1), 13(1), 14
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)

For the appellant - Mathew Thomas Philips, Lavania Kumaraendran & Mavinthra Jothy; M/s Thomas Philip
C
For the respondent - P Jeyakumar & Nur Hidayah Saidi; M/s Zahir Jeya & Zainal

[Editor's note: For the High Court judgment, please see Port Kelang Authority v. Datin Paduka Phang Oi Choo; Tan Sri Datuk G Gnanalingam & Ors (Third Parties) [2016] 10 CLJ 522 (overruled).]

D *Reported by Najib Tamby*

JUDGMENT

Zamani A Rahim JCA:

E **Introduction**

[1] This is the appellant's four consolidated appeals against the order of the High Court, Shah Alam on 17 March 2016 allowing the third parties' application to strike out the appellant's statement of claim pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012. The four consolidated
F appeals before this court are as follows:

(a) Civil Appeal No. B-02(IM)-760-04-2016

(b) Civil Appeal No. B-02(IM)-761-04-2016

(c) Civil Appeal No. B-02(IM)-762-04-2016
G

(d) Civil Appeal No. B-02(IM)-763-04-2016

(the "consolidated appeals")

[2] For ease of reference, the respondents in the consolidated appeals will be collectively referred to herein as the "third parties".
H

Material Facts

[3] The material facts pertaining to the consolidated appeals are set out below.

I **[4]** The main action in the High Court was commenced by Port Kelang Authority ("PKA") against the appellant. The action was premised on a series of allegations of breach of fiduciary duties in the appellant's capacity as general manager and Board member of PKA pertaining to the Port Kelang Free Zone project ("PKFZ project").

[5] In her defence, the appellant pleaded that the breaches complained by PKA were made as a result of the collective deliberation, discussion and/or decision-making process undertaken by the Board members of PKA, all of which were approved by the relevant Ministries of the Government of Malaysia.

[6] In this regard, the Ministry of Transport ("MOT") and the Ministry of Finance ("MOF") were the approving authorities of any decisions and/or acts of PKA.

[7] The appellant had on 5 May 2011 initiated third party proceedings against 26 other third parties in the High Court to seek contribution in the event she is found liable for any loss and damage suffered by PKA.

[8] The appellant's statement of claim particularises the appellant's allegation of the third parties' involvement in respect of the PKFZ project: see pp. 312 to 360 of rekod rayuan bahagian A Jilid 1(2). Briefly, the appellant's allegations are, amongst others, as follows:

(i) The third parties, as Board members of PKA collectively owed a duty of care (both fiduciary and at common law) to PKA;

(ii) Pursuant to Circular No. 3 of 1998, which has been adopted by PKA during a Board meeting on 7 December 2000, the third parties as Board members are collectively responsible for all the decisions and activities undertaken by the Board of PKA; and

(iii) The third parties were all jointly involved and/or participated in the discussions, deliberations and/or decisions which were made during the Board meetings of PKA. At all material times, the third parties had knowledge of all decisions made and/or to be made by the Board with regards to the PKFZ project.

[9] Further to the third party claim taken out by the appellant, the third parties had *vide* four separate applications, applied to the Shah Alam High Court to strike out the appellant's third party notice and all references thereto *via*:

(i) The first third party's notice of application dated 6 July 2015 ("encl. 83");

(ii) The fourth, 11th, 13th, 14th, 16th, 18th, 19th, 20th, 22nd, 23rd, 24th and 26th third parties' notice of application dated 3 September 2015 ("encl. 90");

(iii) The second, eighth, ninth, 12th, 15th, 17th and 21st third parties' notice of application dated 30 September 2015 ("encl. 92"); and

(iv) The third, fifth and sixth third parties' notice of application dated 24 November 2015 ("encl. 99").

(the "striking out applications")

[10] On 17 March 2016, the Shah Alam High Court allowed the striking out applications with costs of RM40,000 to be awarded to the first third party and the costs of RM50,000 to be awarded to the remaining third parties.

The Findings Of The High Court

[11] In allowing the third parties' striking out application, the learned Judicial Commissioner (JC) observed and made the following findings of fact and/or law, amongst others:

(i) The claim brought by the plaintiff (PKA) against the appellant was in her capacity as the general manager ("GM") and a Board member of PKA;

(ii) The third party notices ("TPN") issued by the appellant for contribution against the third parties must be related to the PKA's pleaded claim and cause of action against the appellant;

(iii) A third party claim cannot exist independently and be a separate claim unrelated or without any nexus to the pleaded claim;

(iv) There was no relationship shown to exist between the appellant and the third parties that can give rise to the appellant's right to claim contribution from the third parties; and

(v) The third parties as members of the PKA Board are conferred statutory protection under s. 3A(1) of the Port Authorities Act 1963.

The Appeal

[12] Dissatisfied with the decision of the learned JC, the appellant filed an appeal to this court. Hence the present four consolidated appeals. The grounds of appeal advanced by the appellant in accordance with the memorandum of appeal are as follows:

(a) Learned JC had erred in law and/or fact in allowing the third parties' application to struck out the appellant's statement of claim against them (encl. 90);

(b) Learned JC had erred in law and/or fact in failing to find the appellant's statement of claim against the third parties did not raise any triable issues, amongst others as follows:

(i) whether the third parties as the members of the Board of PKA who were present during the Board meetings involving the decision-making process relating to PKFZ project;

(ii) whether the third parties as the members of the Board of PKA were responsible of the collective decision-making process pertaining to PKFZ project or some other reasons that the action should proceed to trial.

(c) Learned JC had erred in law and/or fact in not finding that there were triable issues, especially the involvement of the third parties in the collective decision in the meetings of the Board of PKA which was

merely determined on affidavits' evidence, whereas it should be effectively determined through a *viva voce* evidence at the trial of the action.

(d) Learned JC had erred in law and/or fact in finding that the third parties as the Board members of PKA could not be liable as joint tortfeasors as there is no such provision in the Port Authorities Act 1963.

(e) Learned JC had erred in law and/or fact for failure to find the third parties as joint tortfeasors were collectively liable for the claim of contribution, in the event that the PKA's claim against the appellant was proven.

(f) Learned JC had erred in law and/or fact in finding that the appellant had failed to show that she had a reasonable claim against the third parties or some other reasons that the action should be tried.

The Third Parties' Submission

[13] Before us, learned counsel for the first third party *vide* Civil Appeal No. B-02(1M)-760-04-2016 canvassed *inter alia*, as follows:

(i) The plaintiff's (PKA) claim against the appellant is for acts and/or omissions of the appellant in her capacity as the General Manager of the PKA and not for any acts and/or decisions and/or omissions carried out with members of the PKA;

(ii) The PKA in its amended statement of claim averred that as the general manager of the PKA, she owed various fiduciary duty, contractual and common law duties to the PKA;

(iii) PKA's claim is premised on the appellant's executive role and function as general manager while it is undeniable that the first third party was a member of the Board of PKA without any executive function or duty;

(iv) The appellant's TPN sought from the third parties contribution for being a Board member of the PKA;

(v) It is trite that in a third party application for contribution, the appellant has to satisfy that there is a question fit to be tried as to liability of the third parties to make contribution on the claims by the PKA against the appellant. The claims by the PKA against the appellant are in relation to the personal breaches by her in her capacity as the General Manager of the PKA and not for actions or decisions of the Board;

(vi) There can be no relationship between the appellant and the third parties that give rise to any joint collective responsibility to the PKA;

(vii) The averments in paras. 84 to 87 of the appellant's statement of claim against the third parties cannot be equated with them being averments

of the appellant's wrongs or of the third parties being a joint tortfeasor in the wrongs alleged against her by the PKA;

(viii) Generally, the third parties were involved and participated in some decisions-making process. This however falls short of what is required to make the third party a joint tortfeasor with the appellant. It is trite that there ought to be more than passive presence and participation in the decision-making process. In addition, there must also exist, the element of active and purposeful procurement of the tort: see *Sime Darby Bhd & Ors v. Dato' Seri Ahmad Zubir Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties)* [2012] 9 MLJ 464;

(ix) There is no such legal relationship giving rise to such a notion as suggested by the appellant and the claim against the third party is totally flawed and without basis: see *Dato' Abul Hasan Mohamad Rashid v. Multi-Code Electronics Industries (M) Bhd & Anor* [2012] 1 LNS 258; [2012] 5 MLJ 176;

(x) Sections 13(1) and 14 of the Port Authorities Act 1963 are self-explanatory in that only the appellant as general manager is an officer of the PKA and has executive duties;

(xi) The appellant is not entitled to claim contribution from a member such as the third party who is a statutory appointee protected by law and one who is not a joint tortfeasor with the appellant; and

(xii) Section 3A(1) of the Port Authorities Act 1963 specifically provides statutory protection from personal liability to any member of the authority. As a statutory appointee, the third party has statutory protection from personal liability and cannot be subjected to any claims, action, liability or demand under s. 3A(1) of the Port Authorities Act 1963.

[14] Briefly, learned counsel for the third parties *vide* Civil Appeal No. B-02(1M)-761-04-2016, Civil Appeal No. B-02(IM)-762-04-2016 and Civil Appeal No. B-02(IM)-763-04-2016 advanced the submission as follows:

(i) The statement of claim by PKA against the appellant is for breach of her duties as the General Manager of PKA;

(ii) The third parties are statutory appointees by virtue of s. 2 of the Port Authorities Act 1963 and only get an allowance for being members of the Board of PKA. None of the third parties hold any executive post in PKA. None of the third parties are paid any salary by PKA;

(iii) The appellant, as general manager, is the top executive of PKA and heads the administration of PKA. The appellant has a contract of service with PKA and is a salaried employee of PKA;

(iv) The third parties did not take part in any of the breaches as alleged or complained of by PKA;

(v) The third parties are not joint tortfeasors with the appellant and hence the appellant cannot seek contribution from the third parties *via* third party proceedings;

(vi) None of the allegations of breaches as stated in the statement of claim touches upon or implicates the third parties. Therefore, there are no issues to be tried with respect to the claim made by the appellant against the third parties;

(vii) The affidavits, the Port Authorities Act 1963 and the law is sufficient for the court to determine the matter by way of interlocutory proceedings;

(viii) As such the claim by the appellant:

(a) Discloses no reasonable cause of action against the third parties;

(b) Is scandalous, frivolous and vexatious;

(c) Would prejudice, embarrass and delay the trial of the action; and

(d) Is an abuse of the process of the court.

[15] Learned counsel for the first third party submitted that it is trite that the court may at any stage of the proceedings order to be struck out any action on the ground that it discloses no reasonable cause of action. It is scandalous, frivolous or vexatious, it may prejudice or otherwise an abuse of the process of the court: see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7.

[16] The High Court had closely scrutinised all the issues raised and His Lordship was correct in allowing the third parties striking out applications against the appellant's claim which was obviously unsustainable.

Our Decision

[17] We propose to deal with the issues of law and fact raised by the appellant and the third parties under the below-mentioned headings.

The Law On Striking Out

[18] Order 18 r. 19(1) of the Rules of Court 2012 sets out in no uncertain terms the four limbs that allow for the striking out of a claim and/or pleading.

[19] It is settled law that only in plain and obvious cases recourse should be had to the summary process under O. 18 r. 19(1) of the ROC 2012. A claim can only be struck out where it appears on the fact of it to be obviously unsustainable: see *Bandar Builder Sdn Bhd & Ors*, *supra*.

[20] It is trite that even if a single triable issue is raised and shown to be existed, the action should proceed to trial. The action should not be summarily disposed. Also the mere fact that the case is weak and not likely to succeed at the proper trial is no ground for the pleadings to be struck out: see *Wenlock v. Moloney* [1965] 2 All ER 871 CA.

[21] In dealing with striking out application under O. 18 r. 19(1), this court in *See Thong & Anor v. Saw Beng Chong* [2012] 1 LNS 817; [2013] 3 MLJ 235, reminded judges that "the power to strike a case under the order without having to go for trial should be exercised sparingly and only in a plain and obvious case. The procedure is of a summary nature. The party affected should not be deprived of his right to have his case proceeded by a proper trial unless the claim is obviously unsustainable. The Federal Court in the case of *CC Ng & Brothers Sdn Bhd v. Government of State of Pahang* [1985] 1 CLJ 235; [1985] CLJ (Rep) 45; [1985] 1 MLJ 347, had said that 'the inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with utmost caution' - per Seah FJ. It is a power which ought to be very sparingly exercised and only in very exceptional cases (per Lord Herschell in *Lawrence v. Norrey* - as cited in CC Ng & Brothers)."

[22] The case in which a striking out claim was set aside on appeal, is exemplified in the case of *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 CLJ 75; [2012] 1 MLJ 473 where this court made the following observation:

> There are issues of law that need to be elaborated and argued in great detail and for mature consideration. There are also issues of fact for the trial court to scrutinise and determine how and what manner the orders and instructions were made by the first respondent; under what circumstances and in what manner the arrests were affected by the individual arresting officers on all the appellants. It would be also for the trial court to scrutinise the evidence to determine whether the first respondent had "cause to arrest, and if the cause was 'reasonable'". These are factual issues relevant to determine whether the arrests were wrongful or not. Clearly, these issues cannot be summarily disposed of by way of affidavits in a striking out application. This is not an appropriate case to be summarily struck out under Order 18 Rule 19 of the RHC.

[23] In view of the foregoing authority, we are of the view that the above mentioned issues can only be determined by way of an oral or *viva voce* evidence at trial of the matter. This is for the reasons, *inter alia*:

(i) It is insufficient to consider the third parties' extent of involvement and/ or participation in the decision-making process surrounding the PKFZ project solely on the Board meeting minutes produced before the High Court;

(ii) The distinction if any to be drawn between the executorial or non-executorial roles of the appellant and the third parties can only be drawn at the close of trial and not summarily by way of affidavit evidence. This is of paramount importance given that the Port Authorities Act 1963 is silent on the same;

(iii) The entitlement on the reliance on statutory protection under s. 3 of the Port Authorities Act 1963 can only be triggered once a determination is made on whether the acts taken by the third parties were done for a *bona fide* purpose. The third parties' reliance on this provision at this stage is therefore premature.

Third Party Claim For Contribution

[24] In our jurisdiction, the law on a third party claim for contribution is set out in s. 10(1)(c) of the Civil Law Act 1956. It is reproduced below:

> any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[25] The courts have interpreted the issuance of TPN as arising from situations where if the court can see from the transaction brought before it that the rights of one of the parties will or may be so affected, the court shall have power to bring all the parties before it, and determine the rights of all in one proceeding.

Third Party Proceedings Are Independent From The Plaintiff's (PKA) Claim Against The Appellant

[26] It was the express finding of the High Court that a third party claim cannot exist independently and be a separate claim unrelated or without any nexus to the plaintiff's pleaded claim against the appellant.

[27] In the Supreme Court decision in *Mat Abu Man v. Medical Superintendent, General Hospital Taiping & Ors* [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98; [1989] 1 MLJ 226, it was held *inter alia*, as follows:

> Third-party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant. When a defendant is made liable to the plaintiff, he then has his right open against a third party to establish that he possesses a right to contribution or indemnity from the third party.

[28] In the factual matrix of this case, the appellant's claim against the third parties is that the said third parties were all jointly involved and/or had participated in the discussions, deliberations and/or decisions which were made during the Board meetings of PKA. In this regard:

(i) at all material times, the third parties had knowledge of all decisions made and/or to be made by the Board of PKA with regards to the PKFZ project; and

(ii) accordingly, the third parties, as Board members of PKA collectively owed a duty of care (both fiduciary and at common law) to PKA. This is undisputed.

[29] In the circumstances, if PKA's claim against the appellant were to succeed, the third parties may be held contributorily liable pursuant to their involvement in the PKFZ project. It is further submitted by the appellant that there is no necessity for the PKA's claim against the appellant to be related and/or connected to the issue of whether the collective involvement of the third parties during the Board meetings of PKA had contributed to the loss and damage suffered by PKA.

[30] Taking cognizance of the above, the learned JC had fallen into error in his interpretation of the law in holding that the appellant's third party claim must be related to and/or have a nexus to the PKA's pleaded claim.

The High Court's Failure To Consider Circular No. 3 of 1998

[31] At all material times, reliance was placed by the appellant on Circular No. 3 or 1998 dated 21 July 1998 which was adopted by the PKA *vide* its Board meeting dated 7 December 2000.

> 1. In essence, paragraph 5.4.1 of Circular No. 3 of 1998 expressly sets out that the Board Members of PKA i.e. the Third Parties are jointly responsible for all decisions made by PKA, whether or not they were present during the PKA Board meetings.

[32] A perusal of the High Court grounds of judgment will show that the learned JC had failed to consider and/or had merely glossed over the effect of Circular No. 3 of 1998. Instead, the learned JC proffered the view that the plaintiff's claim was in relation to personal breaches committed by the appellant in her capacity as GM of PKA which does not involve the third parties.

[33] The High Court was erroneous in fact and/or in law in holding that the appellant's liability to PKA, if proven, was of a personal nature. This is because:

(i) at all material times, the appellant had maintained that the third parties were integral to the decision-making process surrounding the PKFZ project;

(ii) specifically, the third parties who were representatives of the Ministry of Finance ("MOF") and Ministry of Transport ("MOT") at the material time played a crucial factor in expressing their views and/or input;

(iii) to that end, it is undisputed that the MOF and MOT were the ultimate approving authorities of PKA;

(iv) accordingly, it would be a fallacy for liability to be placed in the personal capacity of the appellant when the thrust of the decision-making process was helmed by the relevant Government Ministries, to which PKA is subjected to.

[34] The involvement of the third parties specifically the representatives of the MOF and MOT rests squarely within the confines of the appellant's pleaded claim against the third parties insofar as para. 5.4.1 of Circular No. 3 of 1998 is concerned.

[35] It is settled law that where a trial judge has not directed his mind to the relevant issues at hand, appellate intervention is warranted to remedy the fundamental misdirection of fact and/or law. Accordingly, the learned JC's failure to consider the effect of Circular No. 3 of 1998 towards the appellant's claim for contribution against the third parties ought to be remedied by this court.

There Is No Necessity For The Third Parties To Owe A Duty Of Care To The Appellant

[36] It is undisputed here in that the appellant's claim against the third parties is a claim for contribution (and not for an indemnity) in the event the appellant is found liable to PKA. In the case of *Sime Darby Bhd & Ors*, *supra*, the High Court made the following observation:

> I agree with learned counsel for the third parties that none of the relationships recognised either in law or in equity that can give rise to a right to an indemnity, or an obligation to indemnify, exists or existed between the third parties or any of them, and the first and second defendants.

[37] A distinction must be drawn between a claim for an indemnity and a claim for a contribution. The *Sime Darby Bhd & Ors*'s case, *supra* has clearly shown that:

(i) a legal relationship need only be established in a claim for indemnity from a defendant towards a third party;

(ii) there is no necessity for there to be a relationship (whether in law or equity) to arise between the appellant and the third parties before a claim of contribution can be maintained; and

(iii) Insofar as a claim for contribution is concerned, all that needs to be shown is this:

> Under the Malaysian position the first and second defendants would only be entitled to a contribution if the third parties or any of them are in law, joint tortfeasors with the first and second defendants.

[38] The learned JC had therefore erred in making the determination that a claim for contribution by the appellant could not stand against the third parties as no duty was found to exist between the parties. His Lordship had relied on, amongst others, the authority of *Multi-Code Electronics Industries and Anor*, *supra*. To that end, it was contended by the appellant as follows:

(i) it is patently clear in the *Sime Darby Bhd & Ors*, *supra* that the authority of *Multi-Code Electronics Industries and Anor*, *supra* was referred to therein in determining whether a claim for indemnity (and not contribution) could be sustained;

(ii) an analogy was drawn in the *Multi-Code Electronics Industries and Anor*, *supra* that no duty existed between co-directors of a company such that a claim for an indemnity between directors could be sustained;

(iii) it is undisputed herein that the appellant's claim against the third parties is confined to that of a contribution in the event the appellant is found liable to PKA;

(iv) accordingly, the High Court's reliance and/or interpretation of a need for a duty to exist between the appellant and the third parties is misconceived.

[39] In summary, a claim for contribution does not require there to be a relationship/duty to exist. The appellant is only required to show that the third parties were joint tortfeasors and had participated in the procurement of a tort causing loss and damage to PKA (if proven).

The Third Parties Are "Joint Tortfeasors"

[40] The term "joint tortfeasor" has been defined to mean two or more persons who commit a wrong or tort jointly. Further, it is expressed as one of two or more persons acting in concert in commission of a tort. The said term has been judicially considered in the English authority of *Dingle v. Associated Newspapers Ltd* [1961] 2 QB 162 which was in turn cited with approval by the Federal Court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389.

> ... where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those other have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury.

[41] In the present appeal, the appellant asserted that the respondent is a joint tortfeasor (in the event PKA's claim succeeds) in the breaches alleged by PKA. To that end, all that needs to be demonstrated is proof of joint participation between the appellant and the third parties.

[42] The basis for saying that the third parties are joint tortfeasors are as follows:

(i) the PKA Board meeting minutes which have been produced before this court clearly indicate that there was involvement on the part of the third parties, insofar as discussions and/or decisions pertaining to the PKFZ project were concerned;

(ii) we noted that even the High Court had made a finding that the third parties were involved and had participated in some decision-making process involving the PKFZ project.

[43] As can be seen, the third parties were in a position to influence the deliberations, discussions and/or decisions which were made during the Board meetings of PKA. In this regard:

(i) any disclosure of information (or lack thereof) by the relevant MOF and MOT representatives would affect the deliberations, discussions and/or decisions made during the Board meetings of PKA;

(ii) the attendance at the Board meetings of various third parties throughout the appellant's tenure as Board member of PKA will show that the third parties had indeed played an active and purposeful role in the decision-making process pertaining to the PKFZ project.

[44] The above is consistent with the appellant's pleaded case that the third parties had jointly participated and/or were responsible for the alleged impugned decisions taken on behalf of PKA. Therefore, it cannot be viewed that the third parties' presence *albeit* a "passive presence" in the decision-making process surrounding the PKFZ project.

[45] Notwithstanding, the issue of whether or not the third parties had actively participated in the Board meetings of PKA is not an issue which can be summarily determined in order to make a finding whether or not the third parties were "joint tortfeasors". The true extent of the third parties' involvement during the board meetings of PKA can only be properly determined through a full trial of the action, wherein their testimony be subjected to curial scrutiny.

Conclusion

[46] In the circumstances, in view of the complexities and intricate facts involved in the issues raised herein, we agree with the appellant that the claim against the third parties be allowed to proceed and ventilate in a full trial. As such we, therefore, unanimously allowed the four consolidated appeals with costs of RM30,000 in respect of Appeal 760 here and below and RM20,000 in respect of Appeals 761, 762 and 763 here and below. We set aside the order of the High Court. The cost is subjected to allocator. Deposit is refunded.